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Envoyé : 17 juin 2014 21:48
À : Consultation-en-cours
Cc : 'Nadine Wellwood'; cora@nemaonline.ca
Objet : Re: Multilateral CSA Staff Notice Publication and Request for Comments - Proposed Amendments to National Instrument 45-106 Prospectus

Me Anne-Marie Beaudoin
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Dear Me Ann-Marie,

I respectfully submit the following letter in response to the proposed amendments to NI 45-106, CSA Staff Notice dated 20 March 2014.

CSA Staff Notice - Harmonization:
The OM Exemption is an exemption designed to facilitate early stage and small business financing. Not surprisingly, this type of financing often tends to be quite local in nature. Consequently, differences in approach among jurisdictions can very appropriately reflect differences in local capital markets. However, harmonized securities regulation continues to be a goal of the members of the CSA and we are therefore interested in public comment on both the relative merits of the different approaches to the OM Exemption and the extent to which harmonization needs to be a priority in this area of securities regulation.
Comments on Harmonization:
As per the Commissions acknowledgement above, it is important not to under estimate the significant differences that exist between each of the provinces economically, politically and culturally. Although the intent to harmonize the area of securities regulation could be perceived to have some value (purely speculative) in reduced administration or costs, I believe there would be more harm to the private capital markets than benefits derived to investors, industry members, and the many small and medium size businesses that seek the assistance of the market space.
The role of a Federal Securities Regulator (harmonization) is not the mandate of the Federal Government, nor in my opinion should it ever be. As per the ruling by the Supreme Court of Canada, Securities Regulation is the domain of each of the provinces and each regulatory body should attend to the needs of its constituents according to the unique needs and demands of its local economy and public sentiment.
There are both subtle and significant differences that exist between each of the provinces that in maintaining a Provincial Securities Regulator would be more attuned to and more flexible and timely to implement necessary changes as required. The private capital market is certainly not a “one size fits all” environment, and regulatory authorities that truly have the best interest of the investing public and wish to foster a fair and efficient capital market will illicit active involvement from their local industry participants and that is best done on a provincial level. Although I do agree that there should be an open dialogue between each of the provinces on the sharing of best practices and policy, the best practices, policies or opinions of one province may or may not be

relevant to another and thus one National Regulator should be discouraged.

CSA Staff Notice - Proposed Amendments
In Alberta, Québec and Saskatchewan, the Proposed Amendments contemplate the following:
- to limit the risks associated with an investment by a retail investor in illiquid securities, new caps on the aggregate amount that can be sold to any one investor under the OM Exemption in a 12 month period have been proposed:
- $10,000 in respect of all investors who are not eligible investors; and
- $30,000 in respect of investors who are individuals that are not accredited investors and who do not qualify as specified family members, close personal friends or close business associates under the FFBA exemption;

Comments on Proposed Amendments:

Constitutional Rights
After several discussions with many people with various backgrounds we believe this is a direct infringement on an individual's rights and freedoms.
Every investor should have the right to invest or not invest in this market space and what the CSA staff notice proposes to do by imposing such limits is easily achieved at an individual investor level in exercising his or her individual right to not invest. If better investor protection is the objective, better education, and/or stricter penalties for criminal activity should be encouraged. There is no regulation that can safeguard against the swings in the market or losses incurred due to unforeseen but honest events and limiting the rights of individuals is going to change that. Limiting the rights of all because of a handful of complaints from a few (which cannot be substantiated) does not solve the perceived problem and in my opinion would expose investors to other risks not currently taken into consideration.
We would like to bring to the attention of the Provincial Securities Commissions and CSA, the Charter of Rights that clearly states, **"Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof "**, and the Canadian Bill of Rights, Section 1A that states **"the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law"**.
It should not be overlooked that "the right to life, liberty and security of the person and the enjoyment of property, and the right not to be deprived of," is the right to freely chart one's own path, chose one's own career, determine one's own earning potential, and secure one's own retirement. These proposed new changes very much deprive an individual of their right to life, liberty, security of the person and enjoyment of their own property by depriving them of the freedom to invest their after tax dollars as they themselves determine most appropriate. By depriving an individual of their ability to secure their own current and future well-being, including their retirement, this is a direct violation of their fundamental rights and as such these changes and any such further discussion should be abandoned permanently.
We believe that in a fair and just society, this one argument alone would be evidence enough to put an end to these proposed changes.
Has the Alberta Securities Commission consulted the Ministry of Justice on the following proposed changes as it relates to the constitutionality, charter of rights, or bill of rights argument?

Comment – Liability
It is well documented that company pension plans have systematically shifted towards defined contribution plans rather than a defined benefit approach, and thus that the

responsibility for investing for retirement has been shifted from employers and governments to individuals. These proposed changes significantly and unjustly restrict the choices available to these individuals now charged with the responsibility of planning for their own retirements, without limiting access by institutions, pension funds, and wealthy individuals.
It is also noteworthy to put forth the question of liability should the commissions choose to proceed with the implementation of these proposed limits, thus stripping away the right of the individual. I would have to ask who is going to accept responsibility for any losses that an investor may incur as they are forced to look for other alternatives to the exempt market or find themselves subjected to the volatility of only the public markets? Who will accept responsibility for those losses incurred as a direct result of restricting the amount of potential gains that an investor could have made in the exempt market. For example, an investor wanted to invest $50,000 in an opportunity and was limited to $30,000. The investment pays back a 10% annual return and returns the capital in 5 years, however the stock market returns only 3% during the same period. This represents a significant loss to the investor.
Every investor knows that all investments come with risks, and no investment, not even a GIC is without risk. As it currently stands it is the responsibility of the individual alone to assess those risks and make their own personal investment decisions. If this right is taken away, and this Nanny state policy is implemented, this leaves the question of liability wide open - who will become responsible and liable for any potential losses?

Comment – Economic Benefit
Basic Economic Analysis would predict that these proposed changed will have a negative impact to the local and National economy. The broadest measure of the success of an economy is the change in Gross Domestic Product (GDP) which represents the value of goods and services produced in an economy.

Aggregate Supply Curve - The proposed regulations would negatively affect the pool of labor in the market space, land use could be negatively impacted making it less productive, the level of output of capital could be negatively impacted as there would be significantly less capital available in Alberta and Canada. Regulations such as what is being proposed here, are well documented economically to prove to be harmful through additional cost and time to deal with regulation, complexity is a disadvantage to entry and continued support, and often costs businesses efficiency and productivity.

Aggregate Demand Curve - Private investment plays a significant part in calculating the aggregate demand curve, expectations of real net profits from investment projects will be put at risk as undercapitalization becomes more of an ongoing threat to the capital markets, real costs to businesses including the inability to borrow to fund capital projects, the deteriorating business conditions within the exempt market itself will limit new entrants to the market space. These proposed changes can cause investment spending to fall in Canada but can have devastating impacts on Alberta which does not see much in the way of other forms of funding such as Venture Capital, etc. If the profitability of future projects is reduced this reduces investment spending.
Additional **demand on borrowing** – as private investment money decreases it may force governments, other to branches of government, or create hard money lenders to enter the capital markets. This “crowding out” of private investment money will cause additional demands for capital and drive up its cost.
The exempt market plays an important role in the capital markets in Canada, especially for small and medium sized businesses. Small and medium sized businesses represent

a significant percentage of Canada's GDP and are often seen as the backbone of the Canadian economy. There is a need and an important role for the exempt market in supporting the growth and expansion of the small and medium sized business. Every public company that was once a private company, many of them got a helping hand or their real start from the very investors who the commissions are now suggesting to impose these limits.

Canada's economy is forecasted by GDP and is fueled by the entrepreneur and the small and medium sized businesses that will see a significant reduction in their ability to raise capital, in addition to the already increased complexities in regulation and for the many reasons listed above will prove harmful to the Alberta economy.

The Exempt Market has been vital in the raise of capital for a number of very successful and economically beneficial projects. To verify the economic impact of the Exempt Market would take nothing more than to look at the companies and projects that have been built or supported by its efforts. Walton International Group who employs hundreds of individuals and has Billions of dollars of assets under management. Prestige Capital who with the recent completion of their hotels has seen and will continue to bring economic benefits in what they estimate as $500 million to the local area. Olympia Trust who started with Exempt Market dollars now employs hundreds of people. Just recently capital raised from the exempt market has enabled a SME Highway Rock Products to grow from 25 employees to 170 employees. These are just a few examples that illustrate the employment and economic benefits that this industry brings to the Canadian economy.

Comment – Quantity or Quality

These proposed changes are a "check in the box" exercise, which we understood from multiple attendances at Alberta Securities Commission education and training seminars was exactly the opposite of what is desired. This check in the box exercise will eliminate any real need for proper KYC and Suitability. The perception and your statement to Investors and the Industry becomes $30,000 is an acceptable loss. Considering the wide range of investors that fall into the "eligible" category – a $30,000 loss for a client with $50,000 in net financial assets (NFA) is very different than a $30,000 loss for a client with $900,000 in NFA. Under your proposed new limits, there is no differentiation.

Suitability would become nothing more than a quantitative exercise and no longer a qualitative assessment of the individual and their needs and makes the roles of Exempt Market Dealer and Dealing Representative redundant. Issuers who are already struggling with the justification of additional costs and administration of having to work with Exempt Market Dealers would have a legitimate argument to the value of working with a Dealership should you impose these changes. NI 31-103 was implemented only in September of 2010 to move the environment toward a qualitative assessment with new KYC and KYP requirements. These proposed changes are a step backwards and again not what we have been led to believe by regulatory authorities as the direction they themselves wished to see the industry progress.

Comment - Diversification

At a time when the public markets are volatile and the economic outlook is unpredictable at best, people are looking for truly non-correlated assets to diversify their portfolios. Alternatives have been traditionally used as a opportunity to reduce systemic risk, bolster returns, offer diversification that would limit losses to investors who are exposed to the public markets for both high net worth investors and institutional investors. At a time when alternative investments are needed the most, the securities commissions are proposing to restrict access only to those investors that are already

wealthy.

Comment – Under Capitalization Risk

Undercapitalization of projects will increasingly become a significant risk factor as dollars are limited based upon a check in the box quantitative exercise rather than a qualitative suitability assessment that currently exists. This will produce greater competition for limited dollars that would over expose potential Issuers to the risk that the capital cannot be raised not due to lack of interest or opportunity but due to government imposed caps. Alberta and other parts of Canada rely on the exempt market to raise capital offering employment, economic growth, diversity, and stability to the Canadian economy. Such proposed limits threaten to significantly reduce the amount of dollars raised for real estate projects that provide housing and office space, could limit oil and gas exploration and production, and restrict the growth of small and medium sized businesses limiting their potential growth and expansion of their products and services.

Comments - Challenges for Regulators

The proposed changes come with major changes to the regulators as well. Who will monitor the $30,000 annual limit? EMD's or an individual dealing representative will have no possible way to ensure with 100% accuracy if the client has invested only $30,000 in a 12 month period.

In addition to that, Issuers will not know what activities and as a result of client privacy and client confidentiality may inadvertently allow a trade to occur in which the investor has invested more than his/her limit. In an illiquid investment, how is this to be dealt with, who will monitor these activities, etc.

I believe the proposed changes are a significant step backwards and exposes not only investors but Issuers and current industry professionals (EMD's, Dealing Representatives, etc.) to significant risks currently non-existent under the current regulations. These proposed limits are a regression to NI 31-103 and need to be reconsidered.

Comments - Industry Impact

These types of limits would **eliminate any incentives** for new entrants into the market space (EMD's, Dealing Representatives and/or Issuers) in addition to change the way current industry participants conduct their business.

The industry as a result of the new regulations in 2010 has seen its challenges in raising capital for companies. Many individuals have already chosen to leave the industry permanently. Although this has had some positive impacts, such as weeding out some individuals who may have been less than desirable to remain in the industry, it has also impacted the amount of capital that was available for Issuers. Further changes could **see more people leave the industry**, this time the more educated and professional individual in search of other opportunities. At a cap of $30,000 per year, it would be almost impossible to service clients with the same level of quality service that many clients have come to expect and many professionals chose to provide.

Despite best efforts, such restrictions could **push dealing representatives toward higher commissioned products**, **restrict their ability to offer true diversification**, **force registrants to seek other Business Activities**, **significantly reduce the time they spend on research and continuing education** as this new limits could **significantly impact the current lifestyles of Dealing Representatives**.

Dealing Representatives currently employed in this market space may have no choice put to **seek Other Business Activities** to supplement their loss of income and the risk to investors is that again this becomes **a quantitative exercise rather than a qualitative relationship.** The proposed changes limiting each investor to a maximum of $30,000 per year would significantly **impact the current lifestyles of many of the**

Dealing Representatives in the market today. This would mean that the dealing representative in order to maintain the same standard of living that they are accustomed to would have to: a) Take on Other Business Activities, b) or Service More Clients. Both of these options provide **greater risk to the investor** as with such imposed limits it becomes **a tick in the box exercise and the requirement to know the client and suitability are significantly diminished**. Should a dealing representative have to take on other activities to fill the gap in income to support their lifestyles, it again becomes a matter of professional level service. We are encouraging less than professional people to the industry at a time when we need and want more educated and professional people to join. You may also see people leave the industry to pursue other activities, as they can no longer support their families and lifestyles in the manner in which they have become accustomed. Full time employment in the industry will become less likely and the exempt market may become a secondary service or a luxury service offered by a limited few.

Issuers may find that due to the limitations and the increased risks of paying fees, and going through the appropriate channels, the risks of regulatory changes, undercapitalization, etc. are not justified and **Issuers would seek other means to raise capital** that do not fall under regulatory supervision.

Under the proposed changes, there is **little to no viability in operating a smaller Exempt Market Dealership** and may well be a non-viable option to pursue career opportunities without considering Other Business Activities.

These changes will **stifle the markets and restrict its ability to respond to market demands**. These markets often fuel the start of other things and the proposed changes may have the negative impact of stifling the economy and the creativity often found in small to medium sized enterprises in which this industry supports.

We would suggest that the Commissions have not given enough thought and consideration to the wide spread implications of said recommended changes and should reconsider their position. It might be helpful in the future that should the Commissions wish to improve upon existing regulations or propose future changes that in a fair and efficient market, would actually consult the professionals who earn their livelihoods and would happily work side in step with the commissions before such proposed changes are publically released.

Formulating lengthy responses such as these take reputable dealerships, dealing representatives and other industry participants away from the much important roles that they play in our economy. Providing investors who would otherwise not even know about such proposed limitations with much needed information in order to formulate a response too is very time consuming and in this case could have been limited in nature if prior consultation with industry had been the first step. I am sure that the commissions with their limited resources as well agree that there is a more effective and more efficient way of handling these matters in the future.

CSA Staff Notice – Audited Financials

To provide investors with an opportunity to monitor the use by an issuer of the funds it raises, a requirement that an issuer provide ongoing annual audited financial statements and specified disclosure of its use of proceeds derived from distributions under the OM Exemption.

Comments – Audited Financials

This is an area that would certainly be worth further discussion. Although the intent is good, I believe that there are circumstances in which Audited

Financials are an additional and expensive cost to an issuer and may not add any value or protection to an investor. There is also the potential for reduced returns to the

investor due to increased ongoing costs, as well as risks that come as a manager becomes distracted more and more in trying to remain compliant with regulations rather than dedicating his resources to the details of managing his or her project.
There are many merits to audited financials, but a blanket approach should be avoided as we believe that there are
circumstances where audited financials would not add value and may adversely affect the outcome of some opportunities, especially small raises or certain capital raises that do not produce income that would need to raise additional capital to be held in reserve for this ongoing expense.
It is proposed that Issuers provide annual Audited Financial Statements. Although I respect the intent of this proposed change and can see the merit of it in some cases, I also can see some problems.
a) the average investor does not know how to read financial statements well enough to understand the implications to their investment without significant explanation. Most investors do not invest on the basis of financial statements, but rather plain English explanations of the investment opportunity. Many enjoy the exempt market because it offers opportunities that they can understand. Providing a financial statement, whether audited or not, will not assist them in their evaluation of the current state of affairs. Providing a written annual report that offers an explanation of the events and activities completed would be more effective and better received, financials could be included but need to be explained.
b) to whom is the intended audience for audited financials is to be directed. I believe audited financials can add significant value in assessing performance for those industry professionals who know what to look for but can be lost on the average investor. It is also noteworthy that financials, including Audited Financials are sometimes more art than science and creative license is often granted to management.
c) the additional cost will come out of the investors returns, thus it is an additional cost paid for by investors, that cost may not be warranted
d) audited financial statements to a non-operating asset class may expose the investment to unnecessary ongoing financial risk (having to raise reserve funds for audited financials x # of years), may result in cash calls or lack of compliance if a project runs longer than expected, etc. Some investments once the capital has been raised do not receive income and have undetermined time lines and an audited financial statement is an additional cost that may offer no benefit.
e) should a concern or discrepancy be highlighted as a result of whatever the source, audited financials, annual review, on-going due diligence – What are the options available to the Dealerships, Dealing Representatives, Investors, etc. to take the necessary actions to intervene? This is a question that I would certainly like to see discussed in more detail.

CSA Staff Notice – Eligible Investor Test
After further consideration, the AMF, ASC and FCAA determined not to propose excluding principal residence at this time but instead are seeking public feedback on this matter. Factors that influenced that decision include the following:
- the $30,000 investment cap, discussed below, limits the potential exposure of an investor to a risky investment;
- excluding principal residence may treat investors with similar net worth differently depending upon the types of assets they choose to hold; and
- implications to capital raising.

Comments – Eligible Investor Test

I will address the exclusion of principal residence as the $30,000 investment cap has previously been discussed. Although I believe that this would have a smaller impact on the industry and the individual investor, it
should be noted that many investors opt to pay down their mortgages as a part of their overall strategy and to remove/limit an investors right to invest or to penalize him or her for
choosing to implement their investment strategy in one way versus another is wrong. Considering an individual's net worth (which includes their primary residence) is an important consideration when getting to know one's client. Those clients who choose to pay down their mortgages should not be penalized for doing so. Many Canadians view their primary residence as their largest financial asset and have plans to dispose, down size, etc. as part of their retirement planning.

CSA Staff Notice - Marketing Materials

The Participating Jurisdictions have proposed that any marketing materials used in connection with a distribution under the OM Exemption be incorporated by reference into the OM so that there is statutory liability for a misrepresentation. We have included a definition of marketing materials in the Proposed Amendments. The AMF, ASC and FCAA have proposed that the marketing materials be filed with securities regulators.
- to provide investors with the same rights of action in respect of all disclosure made in relation to a distribution under the OM Exemption, a requirement that all marketing materials relating to a distribution under an offering memorandum be deemed to form part of an offering memorandum and be required to be incorporated by reference;

Comments – Marketing Materials

We would welcome the following change of having marketing materials be incorporated by reference into the OM to protect against misrepresentation. Although I believe every investor is responsible for his or her investment decisions, it is and should be a decision that was made with information that is factual. My initial concern would lie with the how this marketing material is dealt with at a regulatory level. Should these materials require detailed reviews and permission to be granted to an Issuer, and this review cannot be conducted in a timely or objective manner this could have negative impacts on the industry, including missed timing of opportunities, increased pressure to deadlines that could present challenges (e.g. meeting the 150 minimum investor deadline, etc.)

CSA Staff Notice - Ongoing Annual Disclosure

When the OM Exemption was first being considered for adoption, some form of ongoing financial disclosure requirement was considered. However, we concluded that it was not necessary as we thought most small issuers would be subject to annual financial statement requirements under applicable corporate law. This assumption has proven inaccurate. Many issuers using the OM Exemption are not organized under business corporation's statutes and are not subject to an annual financial statement requirement. In the absence of financial statements, security holders are unable to assess how the financing proceeds have been used. Accordingly, the Participating Jurisdictions have proposed a requirement that an issuer relying on the OM Exemption prepare annual financial statements within 120 days of its financial yearend. We also propose that a discussion of the use of proceeds accompany the financial statements.

Comments - Ongoing Annual Disclosure

Every company should complete financials each and every year in a
timely fashion as this is simply good business practice. A discussion of the use of proceeds would be the most valuable part of this proposed change as

numbers are often difficult for the average investor to interpret or understand but a plain language description of the use of the proceeds allows for each investor to assess the value of their investment, an annual report written in plain language may provide more value.

Kind Regards,

Shane Doran
Investment Representative

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